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No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STROH CONTAINER COMPANY,

Petitioner,

against

DELPHI INDUSTRIES, INC.
and GEOCARIS AND COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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April 4, 1986

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, The Stroh Container Company,[1] respectfully prays that a writ of certiorari be issued to review the opinion of the United States Court of Appeals for the Eighth Circuit filed in this proceeding on February 12, 1986, affirming the judgment of the United States District Court for the District of Minnesota. The District Court had confirmed an almost $2.1 million award of two members of a three-arbitrator commercial arbitration panel on the ground that under the Federal Arbitration Act and precedents of this Court and their progeny,

[1] Pursuant to Rule 28.1 of the Rules of this Court, petitioner represents that its parent corporation is The Stroh Brewery Company. The claim of respondents has been assigned to Harris Trust & Savings Bank, a subsidiary of Harris Bancorp, itself a subsidiary of the Bank of Montreal.

judicial review of the award, including even of *issues of law* knowingly and wrongfully decided by the arbitrators, was for practical purposes limited to the literal terms of Sections 10 and 11 of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* The Court of Appeals affirmed, relying upon labor arbitration cases to adopt the most limited review possible of the legal bases of commercial arbitration awards. Having done so, the Court of Appeals felt compelled to caution that parties contemplating commercial arbitration should be aware that arbitration "is an inferior system of justice, structured without due process, rules of evidence, accountability of judgment and rules of law."

QUESTIONS PRESENTED

Whether prior precedents of this Court mandate vacation of an arbitration award for any manifest disregard of the law or failure of the award to draw its essence from the contract or agreement.

Whether the courts below applied the proper standard for determining whether manifest disregard of the law was "made clearly to appear."

Whether the courts below properly applied this Court's "manifest disregard of the law" and "essence of the contract" standards in reviewing the award.

Whether the courts below erred in applying in this commercial arbitration case the same restrictive review as that followed in labor cases.

Whether the courts below erred in holding that jurisdiction to confirm awards under Section 9 of the Act is, in the absence of an agreement as to a particular court in the contract, proper in any jurisdiction wherein there is diversity of citizenship or some other basis for federal jurisdiction, rather than in the federal court for the district within which the award was made.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, filed February 4, 1986, is reported at 783 F.2d 743 and is reprinted in the Appendix to this Petition. (A-1). The opinion of the United States District Court for the District of Minnesota, dated December 31, 1984, is unreported and is also reprinted in the Appendix. (A-18). These decisions involve a review of an arbitration award against Petitioner in the amount of $2,094,665.91.

JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit was filed on February 14, 1986, and this Petition for Certiorari is filed within ninety days of that date. On March 6, 1986, the Court of Appeals granted Petitioner's motion to stay issuance of its mandate until April 7, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 9-12 of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, are relevant to the issues raised in this case, as are certain sections of the Illinois Revised Statutes Annotated, including Ill. Rev. Stat. ch. 26, § 2-106(1), and ch. 26, § 2-725(1) and its Official Commentary. These provisions are, however, lengthy and have therefore been reprinted in the Appendix. (A-47).

STATEMENT OF THE CASE

Petitioner Stroh Container Company ("Petitioner") was formerly known as the Jos. Schlitz Brewing Company, a major brewer of beer and malt beverages in the United States. Respondent Geocaris and Company ("Respondent Geocaris") was a wholesale distributor of Schlitz products in part of the Chicago area,[2] operating under a Schlitz Wholesaler Franchise Agreement.

During the middle 1970's the sales of the Schlitz brand began to decline. This decline occurred as a result of a number of factors, including complaints about the quality of the Schlitz brand beer product, intense competition from competing brands, and internal disruptions resulting from the death of Petitioner's chief executive officer and various governmental investigations. According to the majority arbitrators, product problems were corrected by the end of 1977, but the intense competition and internal disruptions continued. In early 1981, the Schlitz Wholesaler Franchise Agreement was transferred, with Schlitz' consent, to a company affiliated with Respondent Geocaris, and in September 1981, the Franchise Agreement was terminated when that franchisee's assets were sold to an unrelated company.[3]

The Arbitration Proceedings

In February 1982, Respondent Geocaris served a Demand for Arbitration upon Petitioner. After some preliminary litiga-

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[2] Respondent Geocaris and Company was merged into Respondent Delphi Industries, Inc. shortly before arbitration commenced. After the award was entered, Geocaris' right to the award was assigned to Harris Trust & Savings Bank of Chicago, which has agreed to be bound by these proceedings.

[3] A discussion of Respondent Geocaris' relationship with Petitioner and its increased involvement in the beer business through affiliated companies appears in the opinion of the dissenting abritrator, reprinted in the Appendix. (A-36—A-40).

tion, arbitration went forward in Minneapolis beginning in May 1984. In that proceeding Respondent Geocaris only sought damages for declining sales allegedly due to customer dissatisfaction with the Schlitz brand beer product. It was stipulated by Respondent Geocaris' counsel that all alleged defective beer had been sold, and no other elements or items of damages other than lost profits resulting from declining sales were sought or attempted to be proved. Petitioner had established in the arbitration proceedings, among other things, that that type of damage recovery was not available under Illinois law and that in any event Illinois law also barred any claims under the applicable statute of limitations.[4]

On October 11, 1984, two members of a three-arbitrator panel entered an award against Petitioner in the amount of approximately $2.1 million. Because requested to do so by the parties, the arbitrators also entered Findings of Fact and Conclusions of Law and written opinions. These findings, conclusions and opinions are reprinted in the Appendix. (Majority, A-30 and Dissent, A-36).

The majority arbitrators' opinion did not cite a single case in support of the award. The dissenting arbitrator's opinion, on the other hand, cited and discussed *Chrysler Corp. v. E. Shavitz & Sons*, 536 F.2d 743 (7th Cir. 1976), as the proper statement of Illinois law, called the majority's finding of

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[4] Under Illinois law (the law which the Franchise Agreement provided was to govern), the recovery of damages for lost profits due to customer dissatisfaction with a product is not permitted as being too speculative. (See Chrysler Corp. v. E. Shavitz & Sons, 536 F.2d 743 (7th Cir. 1976) and Krone Die Casting Co. v. Do-Ray Lamp Co., 297 Ill.App. 602, 18 N.E.2d 100, 106 (1st Dist. 1938). Further, contracts for the sale of goods, including Franchise Agreements, are governed by the Uniform Commercial Code's four-year statute of limitations. (See Section 2-725(1) and the Official Commentary following said provision which appears in the Official Illinois Statutes Annotated, Ill. Rev. Stat. ch. 26, § 2-725(1), reprinted in the Appendix, A-49—A-50).

liability a "literal absurdity" and criticized the award as being without any legal support and contrary to Illinois law. The dissenter then disclosed that Respondent Geocaris[5] and the majority arbitrators had cited and discussed authorities which supported the proposition that awards would not be overturned even for errors of law in an obvious attempt to get the dissenter to join in their award known to the majority to be contrary to law. (A-44—A-46).

The Review by the District Court

Petitioner then sought relief from the United States District Court for the District of Minnesota, the federal court for the district in which the award was made, as required by Sections 10 and 11 of the Federal Arbitration Act. The District Court denied Petitioner's Application to Vacate and granted summary judgment in favor of Respondents on Respondents' action to confirm under Section 9 of the Act.

Although acknowledging that this Court in *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953), had articulated a "manifest disregard of the law" standard as a basis for overturning awards, the District Court paid mere lip service to that decision. The District Court first opined that other courts had found that this

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[5] An invitation for the arbitrators to disregard the law was made by Respondent Geocaris when authorities to support such a position were cited in briefs filed prior to the entry of the award. Geocaris argued, among other things, that the award would not be infirm even if "the damages may be so speculative as to be unsupportable if awarded by a court" and that "the sole test of review of awards is whether the parties received a fair hearing." Although it would have been perfectly proper for Respondent Geocaris to cite such authorities to a reviewing court, to do so to the arbitrators before an award was entered could be only for the purpose of persuading the arbitrators to disregard the law. Further, Respondent Geocaris' citation to authorities which dealt with the alleged power of the arbitrators to make an award of damages too speculative for a court to award is indicative of Respondent Geocaris' concern about the *E. Shavitz & Sons* case.

manifest disregard standard was unworkable, and then, focusing upon some language in *San Martine Compania de Navegacion v. Saguenay Terminals, Ltd.*, 293 F.2d 796, 801 (9th Cir. 1961), concluded that Petitioner had not met its burden of demonstrating that the "arbitrators understood and articulated the applicable law and clearly proceeded to disregard that law." (A-25—A-26). The District Court did so using a "Catch 22" analysis. It required that Petitioner demonstrate that the majority arbitrators expressly state the correct law and then proceed to disregard what was stated. But the District Court refused to consider or draw any inference from the dissenting opinion which clearly indicated that the majority arbitrators knew that their award was inconsistent with the law, when they discussed with the dissenter authorities which purportedly held that awards would be upheld even if inconsistent with the law. Similarly, the District Court did not discuss the *E. Shavitz & Sons* case, which the dissenter said properly stated controlling Illinois law. Thus, because the District Court could not find an express statement of the law alleged to have been disregarded in the majority opinion itself, that court found that Petitioner had failed to meet its burden under the manifest disregard of the law standard (A-26).

On the issue of whether the award drew its essence from the contract, as required by this Court in *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), the District Court concluded that insofar as the award sought to redress damages which Geocaris incurred as a result of what the arbitrators found to be breaches of contract, it could not be said that the award failed to draw its essence from the contract (A-27). What the District Court failed to consider was that the contract expressly provided that Illinois law was to govern, that certain disclaimers of express and implied warranties were in effect, and that the remedy for any defective product was the return of same for credit.[6]

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[6] Incredibly, the majority arbitrators had found that these disclaimers were in fact valid and effective. (A-34—A-35).

The Appeal to the Court of Appeals

The Court of Appeals affirmed. Like the District Court, it focused upon the same narrow requirement imposed by the District Court to determine whether there was a "manifest disregard of the law." Because arbitrators are not required to explain their awards, the Court declined to substitute its judgment for the arbitrators, so it said. Quoting from a Second Circuit decision, *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211-1215 (2d Cir. 1972), the Court of Appeals concluded that "forcing arbitrators to explain their award . . . will unjustifiably diminish whatever efficiency the process now achieves." (A-12). The Court of Appeals agreed with the District Court that only a cursory discussion of the law was included in the majority opinion, overlooking entirely the well reasoned opinion of the dissenter, and concluded that it could not say that the law was stated by the majority arbitrators and then disregarded. (A-11—A-12).

As to the issues of whether the award drew its essence from the contract and whether the award was rational, the Court of Appeals said only that the award could not be set aside because the Court might have interpreted the agreement differently or because the arbitrators erred in interpreting the law or determining the facts. Calling such a result "draconian," the Court proceeded to emphasize the shortcomings of arbitration, the limited judicial review of arbitration proceedings and the presumption that the parties knew or should have known what they were bargaining for when they agreed to arbitrate. (A-12 n. 12).

Indeed, in a lengthy footnote the Court cautioned potential arbitration participants that in arbitration "[p]arties should be aware that they get what they bargain for and that arbitration is far different from adjudication," after earlier opining that "the present day penchant for arbitration may obscure for many parties who do not have the benefit of hindsight that the arbitration system is an inferior system of justice, structured

without due process, rules of evidence, accountability of judgment and rules of law." *(Ibid.)*.

Petitioner respectfully submits that those draconian events envisioned by the Court of Appeals result only if the reviewing courts misinterpret and misapply decisions of this Court and impose conditions when reviewing arbitration awards which in purpose and effect amount to affording no review at all.

Jurisdiction of the Courts Below

The judgment of the Court of Appeals sought to be reviewed here by writ of certiorari affirms the District Court's confirmation of the arbitration award under Section 9 of the Federal Arbitration Act, 9 U.S.C. § 9, and the District Court's refusal to vacate that award under Sections 10 and 11 of that Act. Petitioner's action under Sections 10 and 11 was filed in the United States District Court for the District of Minnesota as required by the Federal Arbitration Act, there being diversity of citizenship between the parties and that court being the federal court for the district within which the award was made. Respondents' action to confirm the award under Section 9 of the Act was first brought in the United States District Court for the Northern District of Illinois and then transferred with Respondent Geocaris' consent to the District of Minnesota under 28 U.S.C. § 1404(a). In fact, the order transferring the case was drafted by counsel for Respondent Geocaris. Although the cases were argued together in the Minnesota District Court, there was no formal consolidation of the cases. Petitioner has and continues to contest the jurisdiction of the Minnesota District Court over Respondents' action on the ground that the United States District Court for the Northern District of Illinois did not have jurisdiction to transfer the case under 28 U.S.C. 1404(a), because that court lacked jurisdiction in the first place.

REASONS FOR GRANTING THE WRIT

I.

This Case Demonstrates the Need for the Court to Reaffirm and Clarify Its Prior Decisions

Review of the Court of Appeals' decision will present a rare opportunity for this Court to clarify prior precedents and to resolve developing conflicts between the various courts of appeals on a number of timely issues involving arbitration under the Federal Arbitration Act, 9 U.S.C. § 1, et. seq. Such a clarification and resolution is extremely important if arbitration, especially in the commercial context, is to become a widely used alternative method of dispute resolution. It comes at a time when some lower courts are experimenting with court-annexed mandatory non-binding arbitration as a method of dispute resolution of certain cases filed in the federal courts.[7] It comes at a time as well when the voluntary submission of matters to arbitration under the auspices of the American Arbitration Association has been encouraged by the Chief Justice and when this Court in *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth Inc.*, ____ U.S. ____, 105 S.Ct. 3346 (1985), recently expanded the application of arbitration to certain complex cases and issues formerly not subject to arbitration.

The Chief Justice's reported remarks[8] should be contrasted with those of the Court of Appeals in this case. Petitioner

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[7] According to the Federal Judicial Center in Washington, D.C., ten district courts are now using such court-annexed arbitration, including the Middle District of Florida, Eastern District of Pennsylvania, District of New Jersey, Northern District of California, Western District of Michigan, Western District of Oklahoma, Middle District of North Carolina, Western District of Texas, Western District of Missouri and the Eastern District of New York.

[8] See, *e.g.*, *Using Arbitration to Achieve Justice*, 40 Arbitration Journal, No. 4, p. 3 (Dec. 1985), for Chief Justice Burger's remarks before the American Arbitration Association and the Minnesota State Bar Association on August 21, 1985.

respectfully submits that the narrow review of issues underlying the award afforded by the District Court and approved by the Court of Appeals below would subvert efforts by the Chief Justice and others to encourage the use of arbitration. If arbitration is what the Court of Appeals says it is in its attempt to alert potential participants in arbitration of its pitfalls (A-12 n. 12), only the most foolhardy would resort to it and the end result would be less use of arbitration as a dispute resolution mechanism. The Court of Appeals for the Seventh Circuit recognized this in *Jones Dairy Farm v. Local No. P-1236*, 760 F.2d 173 (7th Cir. 1985), *cert. denied*, 106 S.Ct. 136 (1985), when it commented:

> The arbitrators' comparative advantage is least (and the courts' greatest) when the arbitrator is addressing a pure question of law; and *if parties cannot get judicial review of such questions, maybe they will be deterred from agreeing to arbitration.* (760 F.2d at 176; emphasis added).

When presented with a proper case, the courts must review awards for those constituting a manifest disregard of the law or those which fail to draw their essence from the contract, or arbitration will lose much of its luster as an alternative method of dispute resolution. This is particularly true when, as here, issues of law are involved. Arbitrators have no particular expertise in this circumstance, and the courts need not and should not defer to them. Respondents will undoubtedly argue, as they have below, that Petitioner seeks yet another review of the facts presented to the arbitrators. This simply is not so. The issues raised herein are primarily pure legal questions which a court is fully capable of addressing, as the Court of Appeals for the Seventh Circuit noted in the *Jones Dairy Farm* case.

Finally, it is noteworthy that the Court of Appeals, in denying Respondents' Petition for increased costs and damages under Appellate Rule 38, held:

> "In this case, we are mindful of the fact that the merits of the jurisdictional and substantive questions raised here

> were not and *are not entirely settled.*" (A-16; emphasis added).

Again, when Respondents opposed Petitioner's Motion to Stay the Mandate on the ground that no questions appropriate for determination by this Court were presented, the Court of Appeals granted Petitioner's Motion *in toto*, notwithstanding Rule 18 of its Rules which had been invoked by Respondents and which provides that "the Court may deny a stay of mandate if the question would not likely be appropriate for determination by the Supreme Court." Petitioner suggests that these actions of the Court of Appeals constitute an implicit recognition that *this case* involves important, unsettled questions appropriate for determination by this Court.

II.

The Courts of Appeals Are Divided on the Proper Application of the Manifest Disregard of the Law Standard

A. Wilko v. Swan Stated the Manifest Disregard of the Law Standard

"Manifest disregard of the law" as a ground for vacating an arbitration award was first articulated by this Court in *Wilko v. Swan, supra.* There, the Court drew a distinction between a misinterpretation of the law by the arbitrators and a "manifest disregard" of the law (346 U.S. at 436). On the point of the power of the courts to vacate awards which are in manifest disregard of the law the Court was unanimous. Justice Frankfurter in dissent joined the majority on this point:

> Arbitrators may not disregard the law. Specifically they are, as Chief Judge Swan pointed out, "bound to decide in accordance with the provisions of section 12(2)." *On this we are all agreed.* (346 U.S. at 440; emphasis added).

Continuing, Justice Frankfurter added:

> But since [the arbitrators'] failure to observe this law "would . . . constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act." . . . appropriate means for judicial scrutiny must be implied, in the form of some record or opinion, however informal, whereby such compliance will appear, or want of it will upset the award. (346 U.S. at 440).

Justice Jackson, concurring in the result, felt compelled to go on record to take issue with the Court's opinion to the extent that it might be read to hold that "the Arbitration Act precludes any judicial remedy for the arbitrator's error of interpretation of a relevant statute" (346 U.S. at 439).

B. The Decisions of the Courts Below Misapply the Manifest Disregard Standard and Conflict with Decisions of Other Courts

The District Court below stated that "[c]ourts which have attempted to apply the 'manifest disregard' standard have conceded that, as stated, it is virtually unworkable," relying upon *San Martine Compania de Navegacion v. Saguenay Terminal, Ltd., supra*, 293 F.2d at 801 n. 4, and *I/S Stavborg v. National Metal Converters, Inc.*, 500 F.2d 424, 430 n. 13 (2d Cir. 1974) (A-24), and the Court of Appeals implicitly adopted this rationale (A-11—A-12).

However, these cases did not find that standard to be unworkable, but only difficult to apply in view of the little instruction offered by the Court in *Wilko*. Most certainly, the Courts of Appeals for the Second and Ninth Circuits in these cases did not reject its application, as the Court of Appeals below implicitly did in applying an extremely narrow construction in this case[9], and as the Court of Appeals for the Seventh

[9] In fact, the Court of Appeals declined to reach the question whether the manifest disregard standard was applicable, because it concluded that Petitioner had not met its burden even if it were. (A-11).

Circuit has done in *Shearson Hayden Stone, Inc. v. Liang*, 653 F.2d 310, 312 (7th Cir. 1981), and *MSP Collaborative Developers v. Fidelity and Deposit Co. of Maryland*, 596 F.2d 247 (7th Cir. 1979). There is a clear conflict whether the lower courts may apply a "manifest disregard of the law" standard, and, if so, how it should be applied.

C. Manifest Disregard of the Law Was Made Clearly to Appear Here

Petitioner is mindful that this Court in *Wilko* has stated that a manifest disregard of the law must be made clearly to appear and that mere mistakes of law by the arbitrator, as opposed to his manifest disregard of it, are not the basis of the review of an award by a court. The Court of Appeals for the Ninth Circuit in *San Martine*, has indicated that such a manifest disregard of the law *might* appear if the arbitrator stated the law and then proceeded to disregard what was stated. Focusing upon this language, the courts below reasoned that because they could find no express statement of the law in the majority arbitrators' opinion, Petitioner had not met its burden. To reach this result, however, both courts wholly disregarded the dissenting arbitrator's opinion which clearly identified the law disregarded — Illinois law denying as too speculative the type of damage recovery awarded by the majority arbitrators, as held in *Chrysler Corp. v. E. Shavitz & Sons*, 536 F.2d 743, 746 (7th Cir. 1976).[10] But the dissenter went further and disclosed:

> "The Claimant [Respondent Geocaris] and *my colleagues* have presented a number of authorities to the effect that arbitration awards will be upheld even if inconsistent with the law...." (A-46 ; emphasis added).

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[10] This statement of the law of damages appears to be uniformly followed in the United States. See Michelin Tire Co. v. Schulz, 295 Pa. 140, 145 A. 67 (1929), a leading pre-UCC case relied upon by the Third Circuit in Neville Chemical Co. v. Union Carbide Corp., 422

(footnote continued on following page)

Thus, it takes no mind reading to see what happened here. The dissenting arbitrator was steadfast that the law of Illinois did not permit the type of recovery of damages sought, and he was confronted with his fellow arbitrators' urging that they could disregard the law without fear that their award would be overturned. A clearer case of a knowing disregard of the law would be difficult to imagine. In effect, the majority's suggestion equates with a statement of the law disregarded.

A similar analysis applies with respect to the Illinois statute of limitations. It was implicitly conceded by Respondent Geocaris in the arbitration proceedings that if a four-year statute of limitations applied, its claim would be barred[11] when it argued for the application of the ten-year statute applicable in Illinois to actions on written contracts generally. In support of this position Respondent has relied in these arbitration proceedings and in the courts below upon only one case, *Lorenz Supply Company v. American Standard Co.*, 100 Mich. App. 600, 300 N.W. 2d 335 (1980), *aff'd*, 419 Mich. 610, 358 N.W.2d 845 (1984), a Michigan Appellate Court case which has been criticized and distinguished by other courts, and is contrary to Illinois law on the matter. *See, e.g., Kirby v. Chrysler Corp.*, 554

(footnote continued from preceding page)

F.2d 1205 (3d. Cir. 1970), cert. denied, 400 U.S. 826 (1970), as the proper statement of Pennsylvania law, and Armstrong Rubber Co. v. Griffith, 43 F.2d 689 (2d.Cir. 1930), where, in an opinion by Judge Augustus Hand, it was likewise held that such damages were not recoverable because they were too speculative. *This is obviously why Geocaris argued to the arbitrators that they were not bound by established legal principles which would foreclose the awarding of such speculative damages.* See note 5, supra.

[11] The majority arbitrators had found that all product problems were corrected by late 1977, over four years prior to filing of the Demand for Arbitration. (See A-32).

F.Supp. 743 (D. Md. 1982).[12] Clearly, Illinois law applies the UCC and its four-year statute of limitations to distributorship contracts such as the Franchise Agreement involved here. (See the Official Commentary to the applicable Illinois UCC reprinted in the Appendix (A-50); *cf. WICO Corp. v. Willis Industries*, 567 F.Supp. 352, 355 (N.D. Ill. 1983)).

There is a need for this Court once and for all to reaffirm the manifest disregard standard and to clarify the circumstances of its application to enable the lower courts to apply it in uniform fashion, rather than by the hit-or-miss approach presently followed.

III.

The Courts of Appeals are Divided on the Proper Application of the "Essence of the Contract" Standard to Commercial Cases

A. This Court Has Adopted the "Essence of the Contract" Standard

In two labor cases this Court has indicated that an arbitration award must draw its essence from the contract or be subject to vacation. In *United Steelworkers v. Enterprise Wheel & Car Co.*, 363 U.S. 593, 597 (1960) and *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-79 (1960), two related cases decided on the same day, this Court noted that an arbitrator played an important role in the collective bargaining process and therefore the Court deferred to the labor arbitrator as to his decision on matters of the shop.

[12] The *Kirby* case is particularly relevant. It concerned a dealership contract not unlike the franchise agreement involved here and applied the UCC's four-year statute of limitations. It also distinguished *Lorenz* factually, relying upon distinguishing factors also present here. (See 554 F.Supp. at 749-751).

particular factory, or particular industry.[13] Nonetheless, the Court held that "his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." (363 U.S. at 597).

B. The Decisions of the Courts Below Misapply the Essence of the Contract Standard to Commercial Cases and Conflict with Decisions of Other Courts

Although the arbitrations involved in these labor cases were under the Labor Management Relations Act, lower courts have held that their rationale is applicable to Federal Arbitration Act cases as well. *San Martine, supra*, 293 F.2d at 801, was one of these cases, as was *Swift Industries, Inc. v. Botany Industries, Inc.*, 466 F.2d 1125, 1129-1131 (3d. Cir. 1972). Both of these cases also recognized that commercial arbitrators under the Federal Arbitration Act are bound by *Enterprise Wheel's* requirement that an award draw its essence from the contract.

The Court of Appeals paid lip service to the rationale of *Enterprise Wheel* and *Warrior & Gulf*, but then it relied wholly upon *labor* arbitration cases to fashion an extremely limited review of *commercial* arbitration awards as well. This action directly conflicts with the decision of the Court of Appeals for the Third Circuit in *Swift Industries* where it held that, although the holdings and rationale of the labor cases applied in commercial cases, review of commercial awards was not as limited as the review of awards in labor cases. (466 F.2d at 1131). Although this holding was called to the attention of the Court of Appeals, it was completely ignored.

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[13] Such deference is inappropriate in the review of commercial arbitration awards, where arbitrators are not chosen for any particular knowledge or expertise.

Relying instead upon *Shearson Hayden Stone, Inc. v. Liang, supra*, 653 F.2d at 312-313, a labor arbitration case, the Court of Appeals said "We may not set an award aside simply because we might have interpreted the award differently or because the arbitrators erred in interpreting the law or in determining the facts." (A-12). One searches in vain, however, for any statement in that case which supports such a proposition, and, indeed, there is a lengthy discussion therein on evidence and testimony at the hearing, indicating a review much more complete than the Court of Appeals would sanction here.

C. The Award Here Does Not Draw Its Essence From the Contract

Besides providing that Illinois law is to govern, the Franchise Agreement contains other provisions disregarded by the courts below. Schedule C ¶ 3 contains the disclaimer "Seller makes no warranty of any kind, whether express, implied or statutory, of any beer or containers sold or shipped to Buyer;" paragraph 10 provides for a limited remedy as to unsaleable products — the return for reimbursement of the Buyer's net costs if it be determined that the Seller was at fault; and Schedule C ¶ 4 permits Schlitz to eliminate, modify or change any of its products at any time. The majority Arbitrators found these limiting provisions to be valid and enforceable. (A-34—A-35).

In an analogous case, *V-M Corp. v. Bernard Dist. Co.*, 447 F.2d 864, 869 (7th Cir. 1971), a manufacturer sued a distributor for an amount owing on the distributor's account, and was met with a counterclaim seeking damages for the manufacturer's failure to supply goods of "adequate and saleable quality," including claims for actual and anticipated loss of profits due to defective merchandise supplied by the manufacturer. The trial court resolved the counterclaims in the manu-

facturer's favor on the ground that a wholesale distributor agreement barred the claims. The court noted:

> Morever, we are not persuaded that Section 2-719(2) otherwise requires the negotiation of the specific limitations of the contract. Section 2-719 was intended to encourage and facilitate consensual allocations of risks associated with the sale of goods. *This is particularly true where commercial, rather than consumer sales are involved. Even where the defects of the goods cause substantial difficulties to those involved in wholesale and retail distribution,* Section 2-719(2) need not automatically require disregard of the particular limitations upon liability specified by the contracting parties . . . . *We see nothing in this record to justify protection of the distributor's profits or expenditures at the expense of the manufacturer's.* (447 F.2d at 869; emphasis added).

This principle is clearly applicable here. The only reasonable construction of the Franchise Agreement can be that Petitioner had the discretion to make its beer as it saw fit and Geocaris' remedy for defective product was limited to reimbursement for any unsaleable or nonconforming products and nothing more. (Geocaris has admitted it sold all of the product purchased from Schlitz as its usual prices and markups.) Again, the majority Arbitrators manifestly disregarded the law and the express terms of the Franchise Agreement to permit themselves to fashion as their own form of industrial justice an unprecedented form of relief not contemplated by the Franchise Agreement or the parties when they entered into it.

The labor arbitrator's role and position in the collective bargaining process stems from the arbitrator's unique knowledge of the shop, factory or industry. Commercial arbitrators do not possess any particularly unique position in commercial transactions and should not be accorded the deference shown labor arbitrators, especially when, as here, legal issues are involved. *See e.g., Jones Dairy Farm v. Local P-1236, supra,* 760 F.2d at 176. The Court should review this case, and resolve the conflict as to the scope of review of commercial arbitration

awards in view of this Court's prior decisions that awards draw their essence from the contract.

IV.

The Courts of Appeals Are Divided as to Proper Jurisdiction under Section 9 of the Federal Arbitration Act

The Federal Arbitration Act contains certain provisions which are jurisdictional in nature. Those provisions appear in Sections 9, 10 and 11 of the Act. Section 9, which is applicable here, provides, *inter alia:* "[i]f no court is specified in the agreement of the parties, then application [for an order confirming the award] may be made to the United States court to and for the district within which such award was made." (A-47).

Here the award was made in Minnesota and there was no agreement for actions to confirm to be brought in any particular court; hence, when Respondent Geocaris brought its action to confirm in the Illinois District Court, it was doing so only upon the theory that there was diversity jurisdiction there, and it was only that jurisdiction which was alleged in the Complaint.

It is now and was Petitioner's position below that the Illinois District Court lacked jurisdiction and hence was powerless to transfer the case under Section 1404(a), because there was no provision in the agreement for the action to confirm to be brought there and that court was not the court to and for the district within which the award was made. It is established that *forum non conveniens* is never available in the absence of jurisdiction in the transferor court. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947), recognized by the Court of Appeals below (A-5 n. 7).

The Court of Appeals construed Section 9 as a special venue provision, not as one creating a jurisdictional barrier. It

did so relying upon certain cases construing Sections 3 and 4 of the Federal Arbitration Act which deal with preliminary actions and actions to stay litigation pending arbitration. (A-5 n. 7). It did not discuss decisions of four courts of appeals which, when dealing directly with Section 9, 10 and 11 issues, have held to the contrary, namely, that actions to confirm, absent agreement for a particular court, must be brought in the district court for the district wherein the award was made. *See Island Creek Coal Sales Co. v. City of Gainesville*, 729 F.2d 1046, 1049-1050 (6th Cir. 1984); *Commonwealth Edison Co. v. Gulf Oil Corp.*, 541 F.2d 1263, 1272 n. 16 (7th Cir. 1976); *City of Naples v. Prepakt Concrete Co.*, 490 F.2d 182, 184 (5th Cir. 1974), *cert. denied*, 419 U.S. 843 (1974); and *United States v. Ets-Hokin Corp.*, 397 F.2d 935, 938-939 (9th Cir. 1968).

The decision of the Court of Appeals for the Fifth Circuit in the *City of Naples* case presents the most direct conflict with the Court of Appeals below. There the Court was faced with proceedings brought in two Courts — one in the district where an arbitration award had been made (the Northern District of Ohio) and one in the district where one of the parties had previously secured an order to compel arbitration and a stay of the proceedings (the Southern District of Florida). After the arbitration was concluded, an action was filed in the Ohio District Court to confirm the award, and the losing party secured a stay of the Ohio action from the Florida District Court. Upon appeal from the Florida Court's order, the Court of Appeals for the Fifth Circuit held:

> The City may be technically correct in urging that the federal court in Florida retained jurisdiction over the stayed lawsuit. Nevertheless, *in view of § 9's command*, and for reasons of judicial restraint and comity, the District Judge should have declined to enjoin the confirmation proceeding in the Ohio District Court. See Reed & Martin, Inc. v. Westinghouse Elec. Corp., 439 F.2d 1268, 1272-1273 (C.A.2 1971). The arbitration hearing had lawfully taken place in Ohio.... Diversity of citizenship existed and more than $10,000 was in controversy. Therefore, under

§ 9, the Ohio District Court is the proper court to confirm, vacate, modify, or correct the arbitration award. (490 F.2d at 184; emphasis added).[14]

Although it is true that a Minnesota court ultimately passed upon Respondents' action to confirm, it did so because that case was transferred under Section 1404(a) and for no other reason. Obviously, Respondents could have dismissed their Illinois action and filed their own action in Minnesota or filed a counterclaim in Petitioner's action pending there. But they elected not to do so.

For purposes of this petition, it is significant that the Court of Appeals' decision is in direct conflict with decisions of the Courts of Appeals for the Fifth, Sixth, Seventh and Ninth Circuits. This conflict is not on a trivial issue, but on one concerning jurisdiction not passed upon previously by this Court. With the growing use of arbitration, this issue should be promptly resolved so that other cases will not be burdened with doubt as to this key issue.

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[14] The only distinction here is that the Illinois District Court in the proceedings prior to the arbitration had not retained jurisdiction when it ordered the parties to arbitrate, thereby eliminating the possibly "technically correct" argument to which reference is made by the Court of Appeals for the Fifth Circuit.

CONCLUSION

For the reasons set forth above, it is respectfully requested that this Petition for a Writ of Certiorari be granted.

April 4, 1986

Respectfully submitted,

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April 4, 1986

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APPENDIX

OPINION OF THE
UNITED STATES COURT OF APPEALS

For the Eighth Circuit

Argued October 17, 1985 Decided February 12, 1986)

Docket No. 85-5118

STROH CONTAINER COMPANY
formerly known as JOS. SCHLITZ
BREWING COMPANY,

Appellee,

v.

DELPHI INDUSTRIES, INC.,

Appellant.

DELPHI INDUSTRIES, INC.,

Appellee,

v.

STROH CONTAINER COMPANY
formerly known as JOS. SCHLITZ
BREWING COMPANY,

Appellant.

EFORE:

Lay, Chief Judge, Arnold and Fagg, Circuit Judges.

AY, Chief Judge. Stroh Container Company (Schlitz) appeals from an amended judgment denying its application to acate or modify a commercial arbitration award, confirming ıe award in favor of Delphi Industries, Inc. and Geocaris and ompany (Geocaris), and granting Geocaris post-award, pre-ıdgment interest.[1]

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[1] Appellant Stroh Container Company was known as chlitz Brewing Company at the time the arbitration award was ıade. Appellee Geocaris and Company merged with Delphi

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In March 1973, Geocaris, a Chicago based beer distributing company, entered into a wholesaler franchise agreement with Schlitz to sell Schlitz brands of beer. The agreement contained a supplemental "schedule" setting forth Schlitz's performance requirements. The schedule imposed an obligation on Schlitz to "[c]onduct all Buyer-Seller relationships in a fair and equitable manner," but the agreement also disclaimed any warranty of any kind on any beer sold to Geocaris. In the event that a product proved unsaleable due to Schlitz's fault, the agreement provided that Geocaris could be reimbursed for its net costs. The agreement stipulated that Illinois law would apply in construing its terms and set forth a three step grievance procedure for resolution of all disputes, culminating in binding arbitration. The agreement also provided that "judgment on the award rendered by the * * * arbitrators may be entered in any Court having jurisdiction thereof."

In late 1974, Geocaris, along with a beer wholesaler's association, began complaining to Schlitz personnel at all levels that Schlitz was supplying poor quality, inconsistent, and unmarketable beer. Schlitz failed to reasonably respond to these complaints until late in 1977. It is undisputed that Geocaris suffered a substantial decline in profits between 1976 and the first half of 1978.

Geocaris terminated the franchise agreement in September 1981 and filed an arbitration demand in February 1982 with the American Arbitration Association. Following lengthy disputes regarding the arbitrability of the matter and the appropriate arbitration locale, arbitration proceedings commenced in Minneapolis before a three person panel in May 1984 and was concluded in Chicago on June 30, 1984. On October 11, 1984,

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Industries after the arbitraton. Since both the arbitration panel and the district court referred to the parties as "Schlitz" and "Geocaris," the same party designations will be used in this opinion for the sake of consistency.

a majority of the panel issued an award in favor of Geocaris. The majority first concluded that the matter was procedurally arbitrable, finding that the demand was timely, that Geocaris had not lost its right to arbitrate due to any failure to comply with conditions precedent to arbitration, and that laches did not bar the arbitration. The award further found that the parties' agreement imposed on Schlitz a duty of good faith and fair dealing, and a duty to conduct all relations with Geocaris in a fair and equitable manner. Schlitz was found to have breached both of those duties "by failing to make any adequate response to the disastrous product problems repeatedly brought to its attention by [Geocaris] and other Chicago area wholesalers of Schlitz products—in effect 'stonewalling' the issue for over two and one-half years." The panel majority also found that Geocaris was entitled to damages caused by Schlitz' breach for the years 1976, 1977, and half of 1978 in the amount of $2,094,665.91, and explicitly stated that no award of damages was made "for deficient product *per se*" because the warranty disclaimer contained in the agreement did not permit such recovery. The dissenting arbitrator strongly disagreed with the majority's result. In the dissenter's view, "to find Schlitz liable here is tantamount to making it the fiduciary, or the insurer, of the distributor's profits."

After the entry of the award, both parties sought judicial review pursuant to the Federal Arbitration Act (hereinafter "the Act"). 9 U.S.C. §§ 1-14. Schlitz commenced an action in Minnesota district court seeking vacation of the award under section 10[2] of the Act or a modification of the award under

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[2] Section 10 of the Act sets forth the grounds for vacating an award, which include:

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

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section 11.[3] In the meantime, Geocaris had filed an action to confirm the award pursuant to section 9[4] in the northern district

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(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10. Subdivision (e) of section 10 permits a court to direct a rehearing of the matter in certain instances upon vacating the award. *Id.*

[3] Section 11 permits a court in any of the following cases to modify or correct an award to effect the intent of the award and to promote justice between the parties:

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

9 U.S.C. § 11.

[4] Section 9 provides in relevant part:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.

9 U.S.C. § 9.

of Illinois. The court[5] transferred Geocaris' action to the federal district court for the district of Minnesota under 28 U.S.C. § 1404(a), permitting a district court to transfer an action for the convenience of parties and witnesses and in the interests of justice to any other district where the action might have been brought.

Schlitz thereafter moved the Minnesota district court to stay Geocaris' confirmation action pending the outcome of Schlitz' action. The district court[6] denied Schlitz' request, and instead consolidated the actions for argument and decision. The district court subsequently confirmed the award and held Schlitz additionally liable for post-award, prejudgment interest. Schlitz then appealed to this court, challenging the judgment below on jurisdictional, procedural, and substantive grounds.

Procedural challenges.

Schlitz claims that the award should be vacated on the ground that the underlying dispute was not procedurally arbitrable.[7] In support of this contention, Schlitz first argues that the

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[5] The Honorable Milton I. Shadur, United States District Court for the Northern District of Illinois.

[6] The Honorable Paul A. Magnuson, United States District Court for the District of Minnesota.

[7] Schlitz also maintained that Geocaris' action for confirmation of the award, brought pursuant to section 9 of the Act, was improperly adjudicated by the Minnesota district court for lack of subject matter jurisdiction. Section 9 permits a party to seek confirmation of the award in the court specified by their agreement, or, if no court is specified, in the district within which such award was made. Schlitz relies on the language of 28 U.S.C. § 1404(a) that if a transferor court lacks subject matter jurisdiction over the transferred action, the transferee court likewise lacks jurisdiction to decide it. *See e.g., Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947) (forum non conveniens never applicable in the absence of jurisdiction). This argument overlooks the recent enactment of 28 U.S.C. § 1691, which confers upon federal courts general transfer power to

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dispute was not "ripe" for arbitration since Geocaris had failed to comply with the pre-arbitration steps set forth in the

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cure a want of jurisdiction. *See also Hempstead County and Nevada County Project v. United States Environmental Protection Agency*, 700 F.2d 459, 462-63 (8th Cir. 1983). Nonetheless, Schlitz urges us to construe section 9 of the Act as conferring exclusive subject matter jurisdiction for this action in the district of Minnesota where the award was entered and to conclude that since Geocaris commenced its confirmation action in Illinois district court, the Illinois court's transfer of the action under § 1404(a) was ineffective to confer jurisdiction on the Minnesota court.

Even had the Illinois district court simply dismissed Geocaris' action, as Schlitz suggested would have been the proper course, the issues presented in the confirmation action would necessarily have been decided as part and parcel of Schlitz' own action for vacation or modification of the award. The Minnesota district court reached the same conclusion in ordering all the actions consolidated for decision. Moreover, Geocaris would have been free to file a new, separate action for confirmation in Minnesota had the Illinois action been dismissed. Thus, Schlitz would have occupied the same position with respect to its liability for the award regardless of the route taken to the jurisdiction of the Minnesota district court.

The linchpin of Schlitz' jurisdictional challenge is its premise that section 9 establishes a jurisdictional limitation on the availability of a federal forum for confirmation actions above and beyond ordinary diversity or federal question requirements. We construe section 9, however, not as creating a jurisdictional barrier, but as a special venue provision.

This construction is also consistent with the language of related provisions of the Act permitting actions in federal court. *See* 9 U.S.C. § 3, § 4. Neither section 3, allowing a court to stay an action in which the dispute is subject to arbitration under the parties' agreement, nor section 4, permitting a court to compel arbitration upon a petition by either party to an arbitration agreement, countenance that the arbitration agreement itself may confer federal subject matter jurisdiction. *See Commercial Metals Co. v. Balfour, Guthrie & Co. Ltd.*, 577 F.2d 264, 266-68 (5th Cir. 1978) (action to compel arbitration under section 4 requires independent jurisdictional basis); Wright, Miller & Cooper, Federal Practice and Procedure § 3569 at 171 (section 3 necessarily presupposes an independent jurisdictional basis).

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grievance procedure prior to making its arbitration demand. Schlitz also argues that Geocaris lost its right to arbitrate this dispute because Geocaris terminated its relationship with Schlitz before making the arbitration demand, and, finally, that arbitration should have been denied under equitable principles of laches.

Schlitz first raised these arguments before a federal district court[8] prior to the commencement of arbitration. That court in turn referred all issues of procedural arbitrability to the arbitration panel. Schlitz again raised the identical contentions to the arbitration panel. The panel majority made the following findings resolving Schlitz's procedural challenges:

> 1. This matter came on before the arbitration panel pursuant to a timely demand as amended by claimant which demand as amended was made pursuant to the Wholesaler/Franchise Agreement.
>
> 2. Claimant's right to arbitrate survived the termination of the Wholesaler/Franchise Agreement.
>
> 3. Claimant did not lose its right to arbitrate due to any failure to comply with conditions precedent to arbitration.
>
> 4. Arbitration was not barred by laches.

The dissenting arbitrator, while disagreeing with the majority on the merits, did not contest the majority's findings on arbitrability. The Minnesota district court also rejected Schlitz'

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Since sections 3 and 4 neither expand nor contract federal subject matter jurisdiction, it would be anomalous to construe section 9 as affecting the scope of jurisdiction. *See Moses H. Cone v. Mercury Construction Co.*, 103 S. Ct. 927, 942 n.32 (1983). Geocaris properly pled diversity of citizenship jurisdiction in the Illinois district court in its confirmation action. Thus, subject matter jurisdiction was not defective in that action, and Schlitz' argument that the Illinois court lacked jurisdiction to effect a transfer to the Minnesota district court must fail.

[8] The Honorable James B. Parsons, United States District Court for the Northern District of Illinois.

procedural challenge, noting first that "Schlitz raised these issues in the proceedings below and the arbitrators found them to be without merit," and finding "that these issues continue to be without merit."

Our review of the challenged procedural arbitrability determinations must be conducted in light of the established principle that such issues should be left to the arbitrator to decide. *See John Wiley & Sons v. Livingston,* 376 U.S. 543, 557 (1964); *Automotive, Petroleum and Allied Industries Employees Union v. Town and Country Ford, Inc.,* 709 F.2d 509, 511 (8th Cir. 1983). This rule of deference is founded on the recognition that (1) procedural questions are often intertwined with the merits of the dispute and (2) the reservation of procedural issues for the courts provides an opportunity for serious delay and duplication of effort. *See Wiley,* 376 U.S. at 556-58.[9] In translating this rule of deference into a standard of review, we must therefore accord even greater deference to the arbitrator's decisions on procedural matters than those bearing on substantive grounds. *United Steelworkers of America v. Ideal Cement Co.,* 762 F.2d 837, 841 (10th Cir. 1985). As we discuss *infra,* an arbitrator's conclusions on substantive matters may be vacated only when the award demonstrates a manifest disregard of the law where the arbitrators correctly state the law

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[9] The *Wiley* rule arose from and has most often been applied in the context of arbitrations involving disputes under collective bargaining agreements. We find its rationale equally applicable in the commercial arbitration setting. *See District No. 9, IAM v. Wagner Division, McGraw Edison Co.,* 567 F. Supp. 973, 977 (E.D. Mo. 1983); *Newark Stereotypers Union v. Newark Morning Ledger Co.,* 261 F. Supp. 832, 834-35 (D.N.J. 1966). Substantive and procedural issues are no less overlapping in commercial arbitrations, and, as this case indicates, the hazards of delay and duplication of effort are no less probable. We are now the third judicial decision maker to review these questions, in addition to the consideration given the procedural arbitrability issues by the three-person arbitration panel.

and then proceed to disregard it, if the award is otherwise irrational, or if any of the explicit grounds for vacation or modification set forth in sections 10 and 11 of the Act are present.

Given the narrow sweep of that standard it is difficult to articulate a standard of an even lesser scope to apply for procedural challenges. In this case, however, we need not reach for the appropriate articulation of the lesser standard, since even under the "manifest disregard" standard, the arbitrator's determinations must be upheld. There is simply no suggestion in the findings made by the arbitrators on the procedural arbitrability question that they expressly flouted the law in reaching their decision or otherwise acted irrationally. Nor are any of the bases for judicial action enumerated in sections 10 and 11 met here. *See* 9 U.S.C. §§10, 11. We hold, therefore, that the procedural issues were properly decided by the arbitrators based on their own conclusion that the matter was properly before them.

Substantive challenges.

Schlitz's principal challenge to the award on appeal concerns the substantive propriety of the award. Schlitz argues that the award must be vacated or modified on the grounds that the arbitrators manifestly disregarded the law in awarding damages and in applying the applicable state statute of limitations, that the award failed to "draw its essence" from the contract, and that the award was irrational as to liability and the size of the damage award.

In considering the merits of Schlitz's argument on these points, we must first determine whether the grounds set forth by Schlitz constitute permissible bases for vacating or modifying the award under the statute. By their express terms, sections 10 and 11 allow an award to be disturbed when the process was seriously subject to question, *see* 9 U.S.C. §10(a), (b), (c), when the arbitrators "exceeded their powers," *see* 9 U.S.C. §§10(d), 11(b), or when a simple formal, descriptive, or

mathematical mistake was made, *see* 9 U.S.C. §11(a), (c). These grounds have often been deemed the exclusive grounds for vacation or modification. *See Shearson Hayden Stone, Inc. v. Liang,* 653 F.2d 310, 312 (7th Cir. 1981); *Diapulse Corp. of America v. Carba, Ltd.,* 626 F.2d 1108, 1110 (2d Cir. 1980). Some courts, however, have suggested that an award may be set aside if it is in "manifest disregard of the law," *Office of Supply, Government of Republic of Korea v. New York Navigation Co.,* 469 F.2d 377, 379-80 (2d Cir. 1972), *Swift Industries, Inc. v. Botany Industries, Inc.,* 466 F.2d 1125, 1130-31 (3rd Cir. 1972); *San Martine Compania de Navegacion v. Saguenay Terminals, Ltd.,* 293 F.2d 796, 801 (9th Cir. 1961), is completely irrational in that it fails to draw its "essence" from the agreement, *Storer Broadcasting Co. v. American Federation of Television and Radio Artists,* 600 F.2d 45, 47-48 (6th Cir. 1979), *Swift Industries,* 466 F.2d at 1131, or contravenes a deeply rooted public policy, *Revere Copper and Brass, Inc. v. Overseas Private Investment Corp.,* 628 F.2d 81, 83 (D.C. Cir. 1980), *Diapulse Corp.,* 626 F.2d at 1110-1111. These exceptions to the facial restraints on judicial review set forth in the Act are generally derived from language in *United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960), establishing the scope of judicial review in labor arbitration cases,[10] and from dictum in *Wilko v. Swan,* 346 U.S. 427, 436 (1953), recognizing "manifest disregard" as a possible

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[10] Justice Douglas described the limited scope of review in the labor arbitration context:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

ground for vacating an award.[11] Schlitz urges us to adopt these exceptions as the law of this circuit, and to vacate or modify the award under any or all of them.

We need not decide, however, whether to adopt any of these exceptions since, under any one of them, the award must nevertheless be affirmed. Despite Schlitz's vigorous claims to the contrary, neither the award itself nor the record before us suggests that the arbitrators in any way manifestly disregarded the law in reaching their decision. In *Wilko,* the Court carefully distinguished an arbitrator's interpretation of the law, which is insulated from reivew, from an arbitrator's disregard of the law, which may open the door for judicial scrutiny. *Wilko,* 346 U.S. at 436-37. Further, such disregard must "be made clearly to appear," *id.* at 436, and may be found "when arbitrators understand and correctly state the law, but proceed to disregard the same," *San Martine Compania de Navegacion,* 293 F.2d at 801; *see also Drayer v. Krasner,* 572 F.2d 348, 352 (2d Cir. 1978) (relying on *San Martine*); *Office of Supply, Government of Republic of South Korea,* 469 F.2d at 379-80; *Sobel v. Hertz, Warner & Co.,* 469 F.2d 1211, 1214-15 (2d Cir. 1972). In the case before us, the arbitrators' decision does not clearly delineate the law applied, nor expound the reasoning and analysis used. Rather, the award presents, as the district court stated, "only a cursory discussion of what the arbitrators considered to be the key points underlying the award." It therfore cannot be

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[11] The Court in *Wilko* noted first that "[p]ower to vacate an award is limited" but went on to say that

> [w]hile it may be true * * * that a failure of the arbitrators to decide in accordance with [applicable law] would "constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act," that failure would need to be made clearly to appear. * * * [T]he interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.

Wilko v. Swan, 346 U.S. 427, 436-37 (1953) (citations omitted).

said that it clearly appears that the arbitrators identified applicable law and proceeded to reach a contrary position in spite of it. Nor does the absence of express reasoning by the arbitrators support the conclusion that they disregarded the law. Arbitrators are not required to elaborate their reasoning supporting an award, *Enterprise Wheel,* 363 U.S. at 598, and to allow a court to conclude that it may substitute its own judgment for the arbitrator's whenever the arbitrator chooses not to explain the award would improperly subvert the proper functioning of the arbitral process, *see Sobel,* 469 F.2d at 1215 ("forcing arbitrators to explain their award * * * will unjustifiably diminish whatever efficiency the process now achieves").

Further, we are not persuaded that the award was fundamentally irrational or failed to draw its essence from the parties' agreement. Geocaris set forth several rational arguments both before the arbitrators and the courts, consistent with plausible interpretations of state law, justifying the award. We may not set an award aside simply because we might have interpreted the agreement differently or because the arbitrators erred in interpreting the law or in determining the facts. *See Shearson Hayden Stone, Inc.,* 653 F.2d at 312-13. Although this result may seem draconian, the rules of law limiting judicial review and the judicial process in the arbitration context are well established and the parties here, both sophisticated in the realms of business and law, can be presumed to have been well versed in the consequences of their decision to resolve their disputes in this manner.[12]

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[12] Congress, through the Federal Arbitration Act, 9 U.S.C. §§ 1-14, as well as the Supreme Court have expressed increased approval of the use of arbitration rather than public adjudication through the courts. *See. e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 105 S. Ct. 3346, 3354 (1985); *Dean Witter Reynolds, Inc. v. Byrd,* 105 S. Ct. 1238, 1243 (1985); *Prima Paint Corp. v. Flood & Conklin Mfg. Corp.,* 388 U.S. 395 (1967). Undoubtedly, encouraging parties to use this form of alternative dispute resolution in commercial transac-

(footnote continued on following page)

Prejudgment Interest, Costs and Fees.

Schlitz lastly challenges the propriety of the district court's grant to post-award, prejudgment interest. The district court

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(footnote continued from previous page)

tions is premised on the concern for easing rising case loads of the judiciary. Although arbitration often is said to provide simple, inexpensive and expeditious dispute resolution, recent cases before this court, and comments by counsel, as in this case, cast considerable doubt upon such adjectival praise. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey,* 726 F.2d 1286 (8th Cir. 1984) (district court may not grant injunctive relief pending arbitration). Parties resorting to arbitration in commercial situations are finding not only that the arbitration process is complex, expensive and time consuming, but the results of arbitration by private and untrained "judges" are distantly remote from the fair process procedurally followed and application of principled law found in the judicial process. Indeed, arbitration proceedings are intended to be insulated from "obstruction" from the courts. *Prima Paint Corp.*, 388 U.S. at 404.

Counsel for Schlitz has suggested to us that if the appellate courts are in effect unwilling to provide the same review of an arbitration proceeding as is given to a judgment of a district court, that commercial arbitration will cease and the courts will be further inundated with more litigation. Such threats should scare no one. Certainly it should not intimidate the federal judiciary who presently are doing all they can humanly do to maintain the judicial process as expeditious and just. Such comments need to be made however, for parties to the arbitration process to realize that it is not the most perfect alternative to adjudication. The present day penchant for arbitration may obscure for many parties who do not have the benefit of hindsight that the arbitration system is an inferior system of justice, structured without due process, rules of evidence, accountability of judgment and rules of law. The mere fact that arbitration is deemed highly successful in labor disputes overlooks the reason for its legitimacy: that it substitutes for labor's right to strike in a quid pro quo exchange with management. No one ever deemed arbitration successful in labor conflicts because of its superior brand of justice.

We write this response not to denigrate the use of arbitration in commercial transactions. We write only to provide notice that

(footnote continued on following page)

first concluded that federal law should be applied in considering a request for post-award prejudgment interest in a commercial arbitration action arising under the Act, and that the rate at which such interest is calculated should be determined by reference to the state statutory prejudgment interest rate. Neither party challenges those determinations and we will assume the correctness of these propositions for purposes of this appeal. Schlitz argues, however, that the district court abused its discretion in awarding prejudgment interest under federal law. We cannot agree and affirm the award of prejudgment interest by the district court.

As a general rule, prejudgment interest is to be awarded when the amount of the underlying liability is reasonably capable of ascertainment and the relief granted would otherwise fall short of making the claimant whole because he or she has been denied the use of money which was legally due. *See Behler v. Smith,* 719 F.2d 950, 954 (8th Cir. 1983); *see also Short v. Central States, Southeast & Southwest Areas Pension Fund,* 729 F.2d 567, 576 (8th Cir. 1984). Awarding prejudgment interest is intended to serve at least two purposes: to

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where arbitration is contemplated the courts are not equipped to provide the same judicial review given to structured judgments defined by procedural rules and legal principles. Parties should be aware that they get what they bargain for and that arbitration is far different from adjudication. Professor Owen Fiss provides the realism overlooked by many when he writes:

> Adjudication is more likely to do justice than conversation, mediation, arbitration, settlement, rent-a-judge, mini-trials, community moots or any other contrivance of ADR, precisely because it vests the power of the state in officials who act as trustees for the public, who are highly visible, and who are committed to reason. What we need at the moment is not another assault on this form of public power, whether from the periphery or the center, or whether inspired by religion or politics, but a renewed appreciation of all that it promises.

Fiss, *Out of Eden,* 94 Yale L.J. 1669, 1673 (1985).

compensate prevailing parties for the true costs of money damages incurred, and, where liability and the amount of damages are fairly certain, to promote settlement and deter attempts to benefit unfairly from the inherent delays of litigation. *General Facilities, Inc. v. National Marine Services, Inc.*, 664 F.2d 672, 674 (8th Cir. 1981). Thus, prejudgment interest should ordinarily be granted unless exceptional or unusual circumstances exist making the award of interest inequitable. *Ohio River Co. v. Peavey Co.*, 731 F.2d 547, 549 (8th Cir. 1984); *see also Cargill, Inc. v. Taylor Towing Service, Inc.*, 642 F.2d 239, 242 (8th Cir. 1981) (same); *Blau v. Lehman*, 368 U.S. 403, 414 (1962) (interest should be denied when its exaction would be inequitable). Such circumstances may include bad faith or dilatoriness by the claimant, or a claimant's assertion of frivolous claims. *See Cargill, Inc.*, 642 F.2d at 242.

Schlitz first challenges the award of interest on the ground that the district court improperly weighed the equities. The district court awarded prejudgment interest after finding "evidence of no conduct which would render the assessment of prejudgment interest inequitable." We find no abuse of discretion by the district court in that respect. Schlitz claims that the district court failed to give proper weight to the fact that Schlitz did not intentionally sabotage Geocaris' market for its own benefit and did not profit from its actions. The good or bad faith of the opposing party is not of dispositive significance, however. *See Hodgson v. American Can Co.*, 440 F.2d 916, 922 (8th Cir. 1971) (interest awardable nothwithstanding good faith of opposing party); *Lodges 743 and 1746 v. United Aircraft*, 534 F.2d 422, 447 (2d Cir. 1975) (wrongdoing by opposing party not a prerequisite to awarding prejudgment interest). More important is the fact that Schlitz, the opposing party, has had the use of the money in the interim and has thereby been unjustly enriched at the expense of Geocaris. *United States v. Motor Vessel Gopher State*, 614 F.2d 1186, 1190 (8th Cir. 1980); *see Short*, 729 F.2d at 576 (unjust enrichment important consideration).

Schlitz also contends that Geocaris was dilatory in seeking judgment by filing its action to confirm in the "wrong" district and by failing to name certain entities as parties plaintiff. In our view, however, whatever delays were occasioned by these acts are simply those reasonably to be expected in the course of ordinary litigation. Thus, we find no error in the balancing of the equities by the district court.

Schlitz further contends that the district court failed to make sufficiently detailed findings on the appropriateness of prejudgment interest, relying on our decision in *Kisco Co. v. Verson Allsteel Press Co.*, 738 F.2d 290, 296 (8th Cir. 1984). This is not a case like *Kisco*, however, where the district court summarily assessed prejudgment interest with no discussion and no findings whatsoever. *Id.* at 296. Here, the district court carefully outlined and analyzed the operant legal principles in light of the facts, and we discern no necessity for more detailed findings that would justify a remand.

Finally, Schlitz maintains that awarding prejudgment interest would serve to discourage the use of arbitration by penalizing parties "for seeking judicial relief from questionable awards of arbitrators." We do not agree in the first place that an award of prejudgment interest exacts a penalty. Schlitz has had the use of the damage award throughout the course of judicial proceedings, and payment of the interest thereon serves only to give Geocaris full compensation for its damages.

We do not go so far, however, to conclude that Schlitz' appeal was so frivolous as to support an award of attorney fees to Geocaris under Fed. R. App. P. 38. Such awards may be granted in the court's discretion "in the case of a frivolous appeal as a matter of justice to the appellee and as a penalty against the appellant." Fed. R. App. P. 38 advisory committee note. In this case, we are mindful of the fact that the merits of the jurisdictional and substantive questions raised here were not and are not entirely settled. Thus, we cannot conclude that this

appeal was frivolously brought. Costs shall be awarded to the appellee as a matter of course, however. Fed. R. App. P. 39(a).

The amended judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Stroh Container Company, formerly Jos. Schlitz Brewing Company, a Wisconsin corporation,

Plaintiff,

v.

Delphi Industries, Inc., an Illinois corporation, and Geocaris and Company, Inc., an Illinois corporation,

Defendants.

and

Geocaris and Company, Inc.,

Plaintiff,

v.

Jos. Schlitz Brewing Company,

Defendant.

Civil File No. 3-84-1552

MEMORANDUM ORDER

Civil File No. 3-84-1623

The matters before the court are the actions of Geocaris and Company, Inc. to confirm an arbitration award, *Geocaris and Company, Inc. v. Jos. Schlitz Brewing Company,* No. 3-84-1623, and Stroh Container Company to vacate or modify an arbitration award, *Stroh Container Company v. Delphi Industries, Inc.*, No. 3-84-1552. A hearing was held on December 12, 1984. Eugene M. Warlich, Esq., Lowell E. Sachnoff, Esq., and Sarah R. Wolff, Esq., appeared on behalf of Geocaris and Company, Inc. Martha C. Brand, Esq., Paul H. LaRue, Esq., David L. Aufderstrasse, Esq., and William H. Beyer, Esq., appeared on behalf of Stroh Container Company.

Arbitration between Geocaris and Company, Inc. (Geocaris) and Jos. Schlitz Brewing Company (Schlitz) com-

menced on May 7, 1984 pursuant to the Wholesaler Franchise Agreement between the parties.[1] After a lengthy hearing process, arbitration concluded on June 30, 1984. On October 11, 1984, a majority of the arbitration panel issued an award in favor of Geocaris in the amount of $2,094,665.91 for Schlitz' breach of its contractual duty of good faith and fair dealing and its duty to conduct the buyer-seller relationship in a fair and equitable manner.

On October 19, 1984, Geocaris filed an action to confirm the arbitration award and enter judgment, pursuant to 9 U.S.C. § 9 in the United States District Court for the Northern District of Illinois. The action was transferred on November 14, 1984 to the United States District Court for the District of Minnesota pursuant to 28 U.S.C. § 1404(a). Geocaris styled its action as a Motion for Summary Judgment. Meanwhile, Schlitz had filed an action on November 8, 1984 to vacate or modify the arbitration award, pursuant to 9 U.S.C. §§ 10 and 11, in the United States District Court for the District of Minnesota. Schlitz styled its action as an Application for an Order to Vacate or modify the Arbitration Award.

On November 20, 1984, Schlitz moved the court to stay Geocaris' action to confirm the arbitration award, which had been timely noticed and scheduled, pending the resolution of Schlitz' action to vacate or modify the same award, which had yet to be noticed and scheduled. The Court denied Schlitz' Motion to Stay on November 29, 1984. The court found that the objections which Schlitz would have to raise in opposition to Geocaris' action to confirm would be identical to the grounds with which Schlitz would support its action to vacate or modify. The court found it duplicative for Schlitz to oppose con-

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[1] With respect to the corporate names of the parties, Geocaris and Company, Inc. has been merged into Delphi Industries, Inc. and Jos. Schlitz Brewing Company is now known as Stroh Container Company. For the purposes of convenience and consistency, the court will continue to refer to the parties as Geocaris and Schlitz.

firmation of the award in one hearing and move to vacate or modify the award in a separate hearing, especially when the relief sought in opposing confirmation and moving to vacate or modify could be properly requested and considered at the same hearing. The court therefore consolidated the actions for purposes of oral argument and decision.

Section 9 of the United States Arbitration Act provides in relevant part that:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made....

Under 9 U.S.C. § 9, therefore, the court must enter an order confirming the award where: (1) the parties have provided in their agreement that the court shall enter judgment upon the award; (2) the application for the order is timely made; (3) the court has jurisdiction; and (4) the award is not vacated, modified, or corrected. The parties do not dispute that they have provided in their Wholesaler Franchise Agreement that the court shall enter judgment upon the arbitration award. The parties also do not dispute that the application for such an order has been timely made. Whether the court has jurisdiction and whether the award should be vacated or modified, however, are disputed legal issues. There are no genuine issues as to any material facts.

Schlitz challenges the subject matter jurisdiction of the court to hear Geocaris' action to confirm under 9 U.S.C. § 9. Schlitz does not challenge the independent jurisdictional basis

of diversity of citizenship which enables Geocaris to bring this action under 9 U.S.C. § 9 in *a* federal court. Rather, Schlitz challenges the subject matter jurisdiction of the transferor court in the Northern District of Illinois which allowed Geocaris' action to confirm to be transferred to *this* federal court in Minnesota pursuant to 28 U.S.C. § 1404(a). Schlitz argues that, absent a specified court in the agreement of the parties, the federal court in the district in which the award was made has exclusive jurisdiction to confirm an arbitration award under 9 U.S.C. § 9. An action to confirm in this case, according to Schlitz, must be brought in the district in which the award was made, which was Minnesota, because the parties' agreement specified no other court. Schlitz argues that the district court in Illinois lacked subject matter jurisdiction, and, consequently, the power to transfer because it was neither a court specified in the agreement nor a court in the district in which the award was made. Schlitz concludes that the district court in Illinois had the power only to dismiss the action and any attempt to transfer the action was ineffective. Schlitz now asks the court to dismiss Geocaris' action and cure what it perceives to be a jurisdictional defect.

The court, however, does not read 9 U.S.C. § 9 so restrictively. Rather, the court reads the operative provision of § 9 — "If no court is specified in the agreement of the parties, then such application [for an order confirming the award] *may* be made to the United States court in and for the district within which such award was made" — literally and finds that the provision is permissive and not exclusive. *Paul Allison, Inc. v. Minikin Storage of Omaha*, 452 F.Supp. 573, 574-75 (D. Neb. 1978); *NII Metals Services, Inc. v. ICM Steel Corp.*, 514 F.Supp. 164, 166 (N.D. Ill. 1981). An action to confirm may be brought in the district in which the award was made, but it does not have to be brought there. The directive of the statute is permissive rather than mandatory. To find otherwise would be contrary to accepted rules of statutory construction which suggest that Congress would have used language stronger than "such application may be made" had it intended to make

exclusive the jurisdiction of the federal court in the district in which the award was made for actions to confirm an award. *Id.* The court finds therefore that the transferor court in the Northern District of Illinois had subject matter jurisdiction of Geocaris' action under 9 U.S.C. § 9 and was empowered to transfer the action to this court under 28 U.S.C. § 1404(a). The court properly has subject matter jurisdiction of Geocaris' action.

The court notes that Schlitz, in asking the court to dismiss Geocaris' action because the transferor court allegedly lacked subject matter jurisdiction, is inviting the court and "the parties to engage in an additional circuitous procedure to satisfy a jurisdictional technicality," which arguably is unnecessary. *Paul Allison, Inc. v. Minikin Storage of Omaha,* 452 F.Supp. 573, 575 (D. Neb. 1978). That is, even if the court were today to dismiss Geocaris' action on the jurisdictional grounds which Schlitz asserts, nothing suggests that Geocaris would be precluded from refiling this action in this district tomorrow. The court must decline Schlitz' invitation and is reminded that Schlitz, in its Motion to Dismiss or Transfer before the district court in Illinois, argued that a Minnesota court should decide this matter. Schlitz now has the matter properly before a federal district court in Minnesota and the court, consistent with the principles of judicial economy, will proceed to consider the matter.

Having found that the parties have provided in their agreement that the court shall enter judgment upon the award, that the application for the order has been timely made, and that the court has jurisdiction, the court must enter an order confirming the award unless the award is vacated, modified, or corrected as prescribed in 9 U.S.C. §§ 10 and 11. Under 9 U.S.C. § 10, the court may make an order vacating the award upon the application of any party to the arbitration:

> (a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Additionally, some courts, particularly the Second and Third Circuits, have accepted a non-statutory standard of manifest disregard of the law as a basis for vacating an arbitration award. *See, e.g., Office of Supply, Republic of Korea v. New York Navigation Co.*, 469 F.2d 377, 379-80 (2d Cir. 1972); *Trafalgar Shipping Co. v. International Milling Co.*, 401 F.2d 568, 573 (2d Cir. 1968); *Saxis Steamship Co. v. Multifacs International Traders, Inc.*, 375 F.2d 577, 582 (2nd Cir. 1967); *Swift Industries, Inc. v. Botony Industries, Inc.*, 466 F.2d 1125, 1130-31 (3d Cir. 1972); *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 1127 (3d Cir. 1969). Yet, even those courts which have accepted this judicially-created standard caution that it is an "exception" which must be "severely limited." *Id.* Other courts, however, have questioned the validity of this nonstatutory standard when asked to apply it. *See, e.g., MSP Collaborative v. Fidelity & Deposit Co. of Maryland*, 596 F.2d 247, 251 (7th Cir. 1979); *National Railroad Passenger Corp. v. Chesapeake & Ohio Ry.*, 551 F.2d 136, 143 (7th Cir. 1977).

Schlitz contends that the award must be vacated because it was procured by undue means under § 10(a), there was evident partiality in the arbitrators under § 10(b), and the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made under § 10(d). Schlitz, however, apparently does not contend that the undue means, evident partiality, and exceeding of powers are present in the strict statutory sense

of these terms. Rather, Schlitz contends that the award which the majority arbitrators made failed to draw its essence from the parties' agreement and evidenced a manifest disregard of the law. In the circumstances of this case, Schlitz arouses, such failure and manifest disregard rise to the level of statutory bases for vacating the arbitrators' award, such as undue means, evident partiality, and exceeding of powers.

The manifest disregard of the law standard has apparently been gleaned from the language of *Wilko v. Swan*, 346 U.S. 427 (1953). The Court in *Wilko* addressed the issue of whether a provision of the Securities Act of 1933 invalidated an agreement to arbitrate which bound the purchaser of securities. The Court, in finding the arbitration agreement to be invalid, seemed to suggest by way of dictum that a decision of the arbitrators based on a disregard of the applicable securities laws would be reversible under 9 U.S.C. § 10. Noting that the power to vacate the arbitrators' award is limited, the Court stated that:

> While it may be true...that a failure of the arbitrators to decide in accordance with the provisions of the Securities Act would "constitute grounds of vacating the award pursuant to section 10 of the Federal Arbitration Act," that failure would need to be made clearly to appear. In unrestricted submissions..., the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.

Wilko v. Swan, 346 U.S. 427, 436-37 (1953) (footnotes omitted). The Court, however, did not elaborate on the meaning of "manifest disregard" or the distinction it drew between "manifest disregard" and "error in interpretation" of the law.

Courts which have attempted to apply this "manifest disregard" standard have conceded that, as stated, it is virtually unworkable.

> Frankly, the Supreme Court's use of the words "manifest disregard", has caused us trouble here. Conceivably the

> words may have been used to indicate that whether an award may be set aside for errors of law would be a question of degree. Thus if the award was based upon a mistaken view of the law, but in their assumption of what the law was, the arbitrators had not gone too far afield, then, the award would stand; but if the error is an egregious one, such as no sensible layman would be guilty of, then the award could be set aside. Such a "degree of error" test would, we think be most difficult to apply....

San Martine Compania de Navegacion v. Saguenay Terminals Ltd., 293 F.2d 796, 801 n. 4 (9th Cir. 1961).

Similarly,

> [h]ow courts are to distinguish in the Supreme Court's phrase between "erroneous interpretation" of a statute, or for that matter, a clause in a contract, and "manifest disregard" of it, we do not know: one man's "interpretation" may be another's "disregard"....

I/S Stayborg v. National Metal Converters, Inc., 500 F.2d 424, 430 n. 13 (2d Cir. 1974).

Nevertheless, such courts have found "that a manifest disregard of the law in the context of the language used in *Wilko v. Swan* ...might be present when arbitrators understand and correctly state the law, but proceed to disregard the same." *San Martine Compania de Navegacion v. Saguenay Terminals Ltd.*, 293 F.2d 796, 801 (9th Cir. 1961). A "manifest disregard of the law must be something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand and apply the law." *Id.* Such disregard, however, in the language of *Wilko v. Swan*, 346 U.S. 427, 436 (1953), "would need to be made clearly to appear."

Assuming that the arbitration award may be vacated for a manifest disregard of applicable law, the court finds that such a manifest disregard has not been "made clearly to appear" in this case. For the award to evidence a manifest disregard of the law, it must be demonstrated that the arbitrators understood

and articulated the applicable law and clearly proceeded to disregard that law. The award of the arbitrators in this case, however, does not clearly delineate the law to be applied, nor expound the reasoning and analysis which the arbitrators applied in this case. Rather, the award of the arbitrators presents only a cursory discussion of what the arbitrators considered to be the key points underlying the award. The court cannot ascertain from the arbitrators' opinions what the applicable law is which the arbitrators are alleged to have manifestly disregarded. The manifest disregard, as a result, has not been made clearly to appear from the record. Although the award may be large and even perplexing to some, the court cannot say that the award is the product of a manifest disregard of the law.

Schlitz cannot demonstrate to the satisfaction of the court that the arbitrators articulated the applicable law and proceeded wantonly to disregard it. What Schlitz would apparently ask this court to do now is second-guess the majority arbitrators and read the arbitrators' minds to probe their thought processes. Schlitz offers the opinions of the majority and dissenting arbitrators as a springboard for such review. The court, however, does not sit to review the merits of the arbitrators' award or critique the reasoning of the arbitrators. Rather, the court seeks to ascertain whether any of the factors enumerated in 9 U.S.C. § 10 have tainted the award. Even if such review were appropriate, it would likely be impossible on the record in this action. The majority and dissenting opinions of the arbitrators, upon which Schlitz relies, do not lend themselves to the type of analysis or scrutiny which Schlitz seeks. Neither the majority nor the dissenting opinion of the arbitrators is the paradigm of clarity or incisive legal reasoning. But, then, arbitrators' opinions do not have to be. Arbitrators do not have to give reasons or explain their awards and even when they do, nothing requires that they be clear or unambiguous. *United Steelworkers of America v. Enterpirse Wheel*

and Car Corp., 363 U.S. 593, 598 (1960)[2]. It is difficult to discern any clear statement of applicable law, let alone the detailed reasoning of the arbitrators on this record. For the court to speculate as to the law applied or the reasoning which the arbitrators brought to bear on their deliberations, as Schlitz would ask the court to do, would be inappropriate.

What may be discerned from the arbitrators' opinions and the parties' agreement, however, is that Schlitz and Geocaris entered into a contract pursuant to the Wholesaler Franchise Agreement. This contract entailed more than the sale of goods between a seller and a buyer. Rather, the contract embodied a complete and continuous relationship between the parties which drew its strength in part from the express contractual provision requiring that the relationship be conducted in a fair and equitable manner and the implied contractual duty of good faith and fair dealing. The contract also provided that arbitration would be the sole remedy of either party against the other for disputes arising in the course of this relationship. Insofar as the award seeks to redress damages which Geocaris incurred as a result of what the arbitrators found to be Schlitz' breach of these contractual provisions and duties, it cannot be said that the award fails to draw its essence from the parties' agreement. While the arbitrators' award may be unsatisfactory to either or both parties, it is derived nonetheless from the parties' agreement.

Under 9 U.S.C. § 11, the court may make an order modifying or correcting the award upon the application of any party to the arbitration:

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[2] As the Supreme Court noted in *Enterprise Wheel*, "[a]rbitrators have no obligation to the court to give their reasons for an award. To require opinions free of ambiguity may lead aribtrators to play it safe by writing no supporting opinions. This would be undesirable...." *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 598 (1960).

> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
>
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

Schlitz believes that if the court does not vacate the award, it should modify the award under § 11(a) or § 11(b). Schlitz contends that, because the award is irrational in amount and contrary to the Wholesaler Franchise Agreement, the award contains a material miscalculation within the meaning of § 11(a), or was made upon a matter not submitted to the arbitrators within the meaning of § 11(b). How the arbitrators arrived at an award of $2.1 million dollars is not clear from the record. Nor is it clear, however, that the award is contrary to the Wholesaler Franchise Agreement. Schlitz must make a stronger showing than mere assertions of an award irrational in amount and contrary to the parties' agreement, which in themselves are not grounds under 9 U.S.C. § 11, to support the modification of an award. The court finds that Schlitz has failed to show that the award resulted from a material miscalculation or a matter not submitted to the arbitrators. The award, as a result, is not subject to modification under § 11(a) or § 11(b).

Schlitz contends finally that laches, the statute of limitations, and Geocaris' failure to comply with conditions precedent to arbitration bar the award. Schlitz raised these issues in the proceedings below and the arbitrators found them to be without merit. The court finds that these issues continue to be without merit.

The court concludes that Schlitz has failed to make the required showing under 9 U.S.C. § 10 or § 11 necessary for this court to vacate or modify the award. The court must therefore deny Schlitz' Application for an Order to Vacate or Modify the Arbitration Award and grant Geocaris' Motion for Summary Judgment and confirm the arbitrators' award.

At the hearing, the parties expressed to the court their intention to file motions to amend their pleadings to reflect changes in corporate names and real parties in interest. These motions have not been filed and are pending before the Magistrate. The court, while entering this Order, will defer entering judgment until the motions before the Magistrate have been resolved.

Accordingly, IT IS ORDERED that:

1. The Motion for Summary Judgment of Geocaris and Company, Inc. is granted.

2. The Application for an Order to Vacate or Modify the Arbitration Award of Stroh Container Company, formerly Jos. Schlitz Brewing Company, is denied.

3. The October 11, 1984 Award of the Arbitrators in the amount of $2,094,665.91 resulting from the arbitration between Geocaris and Company, Inc. and Jos. Schlitz Brewing Company is confirmed.

4. Each party is to bear its own costs and expenses.

Dated: December 31, 1984.

/s/ _____
Paul A. Magnuson
United States District Judge

AMERICAN ARBTIRATION ASSOCIATION

IN THE MATTER OF THE ARBITRATION BETWEEN

GEOCARIS AND CO., INC.,

Claimant,

and

JOS. SCHLITZ BREWING COMPANY,

Respondent.

FINDINGS AND DISCUSSION

No. 56 114 0192 82

FINDINGS

Arbitability

1) This matter came on before the arbitration panel pursuant to a timely demand as amended by claimant which demand as amended was made pursuant to the Wholesaler/Franchise Agreement.

2) Claimant's right to arbitrate survived the termination of the Wholesaler/Franchise Agreement.

3) Claimant did not lose its right to arbitrate due to any failure to comply with conditions precedent to arbitration.

4) Arbitration was not barred by laches.

Merits

5) Respondent owed a duty of good faith and fair dealing to claimant imposed upon respondent by the agreement.

6) Respondent owed a duty to conduct all relations with the claimant in a fair and equitable manner imposed upon respondent by the Wholesaler/Franchise Agreement.

7) The duties imposed upon respondent in the two preceding paragraphs were breached.

8) For a period commencing in late 1974, to and including approximately mid-1978, Chicago Wholesalers individually and as a group complained vigorously and repeatedly to representatives of respondent at all levels concerning the lack of quality, consistency, marketability and trade acceptance of the Schlitz brand of beer.

9) The wholesalers making the complaints were sophisticated, dedicated, knowledgable, and sincere businessmen who had made substantial investments in their promotion, sale and distribution of Schlitz products.

10) Claimant in particular had chosen to distribute only Schlitz products to the exclusion of other beers and any other products. Claimant had been a loyal, efficient and successful distributor of Schlitz products.

11) The complaints lodged by claimant as well as other distributors in the Chicago area were well founded.

12) The beer being marketed by respondent was consistently inconsistent; it was frequently off-taste, failed to have a proper head, the beer was flat on frequent occasions, exhibited flakiness for a substantial period, and lost market acceptance because of its grossly inferior quality.

13) The substantial factor affecting the decline in the Schlitz brand of beer in the Chicago market area was reoccurring product quality deficiencies.

14) Respondent failed to respond in a diligent and positive manner to the complaints of its distributors and specifically to the complaints of claimant.

15) Because of the serious nature of the product quality complaints and their origin with respondent's experienced and dedicated wholesalers, respondent was obligated to conduct its relations with the claimant in a fair and equitable manner and to deal with the claimant in good faith and fair dealing.

16) Respondent breached the obligation imposed upon it in the last preceding paragraph by failing to make any adequate response to the disastrous product problems repeatedly brought to its attention by claimant and other Chicago area wholesalers of Schlitz products—in effect "stonewalling" the issue for over two and one-half years.

17) Because of the respondent's failure to act as required by the agreement, the claimant was caused to sustain significant damages.

Damages

18) Respondent was obligated to act when confronted with the product quality deficiencies that existed between the years of 1974 and 1977 in the Chicago market area as repeatedly brought to its attention by claimant and other wholesalers.

19) Respondent was entitled to a reasonable period of time in which to act after it became aware of the product quality deficiency problems and the magnitude thereof.

20) By January, 1976, a reasonable period for a genuine and adequate response had passed.

21) Respondent failed to take reasonably prudent action to meet its duty as was required of it under its contract with claimant until the end of 1977.

22) Although respondent commenced dealing with the problems in late 1977, the impact on claimant of respondent's prior derilection continued until at least mid-1978.

23) The burden of proof on all issues rests with claimant and that burden of proof has been met.

24) No award of damages is made for deficient product *per se*.

25) Claimant is entitled to recover damages for the years 1976, 1977, and half of 1978 because of respondent's breach of its duties of good faith and fair dealing as well as fair and equitable conduct.

26) The damages sustained by the claimant to date is the sum of $2,094,665.91.

Discussion

The essence of this case is business risk and a determination of which risks were undertaken by the respective parties to this on-going commercial relationship. The arbitrators believe it significant that the Wholesaler/Franchise Agreement did not cover merely the isolated sale of goods, but rather embodied a continuous relationship between the parties into which both put a tremendous investment of time, effort and capital. The claimant invested millions of dollars in a relationship in which it was not only a single product distributor, but also a single brand distributor. The claimant was therefore "locked into" the Schlitz organization in a way which subjected it to special business risks (and, of course, gave it a unique potential for profitablility).

Out of that relationship, framed by the circumstances in which the parties found themselves and by the terms of the Wholesaler/Franchise Agreement, arose two sets of duties on the part of the respondent: (1) the duty of good faith and fair dealing—an obligation to act toward the claimant in an honest, fair and reasonable manner, and (2) the duty to conduct its part of the relationship in a fair and equitable manner—a duty similar to the first but qualitatively superior.

These duties were breached by respondent's failure to acknowledge and respond in a diligent and reasonable manner to the clear, vigorous and continuing complaints of deteriorating product quality laid before it by the claimant and the other Chicago area distributors. Given their source, the strength and

the continuous nature of these complaints, they could not be ignored consistently with the obligations imposed on the respondent.

The complaints commenced in mid-1974 and continued. There were, of course, short periods when the problems appeared to be fixed, but that was not the case. The product quality, from the responses of the marketplace and from the complaints of the wholesalers, continued to be grossly deficient throughout this period. There are numerous documents in the files of this case as well as substantial testimony which proves the volume and seriousness of the wholesalers' pleas to the company for a response to the decline in product quality. The product quality deficiencies are variously described as flat beer, off-taste beer, flaky beer, lack of head retention, etc. These matters were manifested to Schlitz personnel not only in letters and in meetings with top management, but in constant daily interchanges with the respondent's division and district managers. These reports of deficient product quality fell on deaf ears.

These were not complaints by misinformed persons having no expertise or sophistication in the trade. They came from the claimant, one of the respondent's most successful distributors, and from the other distributors in one of respondent's top marketing areas. They came from experienced, sophisticated businessmen who had committed themselves to the industry and to the respondent's organization. These were not trifling matters. They demanded a diligent, reasonable and positive response from the respondent. However, no such response was forthcoming until very late in 1977.

Claimant took the entire risk of bad product subject only to a return for credit arrangement. In the particular circumstances presented here, the respondent's disclaimer of express and implied warranties is effective. Were the disclaimer not present in the Wholesaler Franchise Agreement, there would have been an implied warranty of merchantibility and an express warranty arising from the samples provided during the parties course of dealing with each other. Both of these warranties would have

been breached in this case. However, the disclaimer is effective and this award includes no damages for bad product *per se.* The product which failed to meet appropriate quality standards was, however, present in the market. That fact is relevant to our finding that the claimant's continuing complaints during the late 1974 period to about mid-1978 were well founded.

Respondent was under an obligation to respond to the complaints brought to it by the claimant. Respondent was, however, allowed some period of time while the complaints built up to a level indicating that there was not an isolated problem but rather a continuing one of major proportions. After that period of "response time" had passed, respondent should have taken diligent and positive action. *It did not.* Respondent's failure to act continued until very late in 1977 and the damaging effects of this failure continued for some period thereafter. Recognizing that bad product (the risk of which was assumed by the claimant) was a major factor in the losses suffered during the relevant period, *we nevertheless feel that a significant portion of those losses were caused by the breaches of duty which occurred.* After examining all the evidence in this case, particularly that presented by the damage experts on both sides, we believe that a rational basis exists for a determination of the claimant's damages with reasonable accuracy. We are satisfied that our award is fair, just and equitable.

/s/ _____
Lawrence D. Cohen, Arbitrator

/s/ _____
Joseph E. Olson, Arbitrator

AMERICAN ARBITRATION ASSOCIATION

IN THE MATTER OF
THE ARBITRATION BETWEEN

GEOCARIS AND CO., INC.,
Claimant,

and

JOS. SCHLITZ BREWING
COMPANY,
Respondent.

No. 56 114 0192 82

DISSENTING OPINION OF ARBITRATOR MILLER

In my opinion, the evidence presented by the Claimant does not justify the factual inferences drawn by my fellow panel members and, even if it did, there would be no basis for a conclusion that there is liability in the Respondent.

These proceedings are ostensibly not subject to review and thus there is not much point in discussing the evidence in detail, nor in passing judgment upon the various precedent and arguments advanced by the parties, as though *ex cathedra;* on the other hand, some dissertation of our reasoning is certainly appropriate in light of the great efforts and expense undertaken by both sides, and also in the event there are post-award motions.

THE FACTS AS I SEE THEM

I would adopt the Claimant's proposed findings virtually intact. Indeed, for all of the testimony, the history of the matter is in large part not disputed. The problem is in the interpretation and the legal inferences to be drawn.

For the record, were I the finder of fact I would adopt the Claimant's proposed findings, subject to my following amplification, with these exceptions:

Proposed FF 17. This assertion is not borne out by my notes of the testimony, and I believe that it is not accurate if taken literally.

Proposed FF 35. The second sentence is too imprecise for me to be comfortable with it. I would accept the point made if it were stated thus: "Schlitz beer was continually reformulated during the period in question. The formulas used from and after 1978 are agreed by the Claimant to have produced satisfactory beer."

Proposed FF 40. This conclusory statement again is not literally correct and therefore I reject it.

Proposed FFs 41, 42, 43 & 45. In my opinion none of these points have been established by the Claimant. See my discussion below concerning the recovery of lost goodwill.

Proposed FF 46. I concur that Schlitz gave its complaining dealers repeated assurances that quality problems would be corrected, but I do not find that Geocaris had any rights under the circumstances.

The Schlitz proposed findings are harder to deal with, because many are argumentative or do not speak strictly to historical facts. Without indicating that I disagree with the substance of other proposed findings, I would specifically adopt the following:

i) FFs 18 through 26;

ii) FF 28;

iii) FFs 30 through 36;

iv) FFs 38 through 41

v) FFs 44 through 48;

Again, I am not necessarily rejecting the other proposals, rather they simply are not in the appropriate form for this purpose. As will be seen I am basically in agreement with the points there made.

Further Findings

I would outline the essential facts of the case in this manner:

1) The Claimant, and its predecessor companies, were all owned by Angelo and Robert Geocaris and their immediate families. Prior to 1976, the sole business of the Claimant was the distribution of Schlitz beer. In that year, the Claimant took on other lines which were not in direct competition with the Schlitz brand.

2) The Claimant was one of a group of several companies owned by the Geocaris families. The assets of the Claimant were often used as the basis for borrowing on behalf of businesses other than that of the Claimant.

3) In late 1977, four corporations related to the Claimant known collectively as Metropolitan Distributors Group, were formed. The sole business of these companies was to distribute beer in substantially the same market area as that served by the Claimant. Some of the brands carried by Metropolitan were direct competitors of the Schlitz brand distributed by the Claimant. The Metropolitan companies were initially financed by the proceeds of a $2.2 Million loan, which was secured by the assets of the Claimant and other of the family companies. The chief financial officer of the claimant was chosen to become the chief executive officer of Metropolitan.

4) The principal of the Claimant was its predecessors, and of the Metropolitan Distributors Group as well, was Mr. Angelo Geocaris. At all times he had final authority concerning the Claimant's operations and planning, although his brother Robert was for a time the nominal corporate president. Mr. Angelo Geocaris is highly intelligent and well educated, in addition to being a lawyer with substantial practical experience. The substantial wealth of the Geocaris family was created primarily through his efforts and successes, all of which were totally ethical. In particular, in the contractual and other dealings

between the parties hereto, the Claimant, by virtue of the knowledge and abilities of Mr. Angelo Geocaris, maintained a bargaining position equal to that of the Respondent. The Claimant had full and complete knowledge of the implications of the contract between the parties. In the circumstances of this case, there is no basis whatsoever for relieving the Claimant of the full impact of the law merchant and of the contract.

5) The formula, or recipe used in making the Schlitz brand product was continually revised to accomodate perceived consumer trends, regulatory requirements, and the price and availability of materials and ingredients. In addition, the formula for producing the brand varied from plant to plant throughout the country in response to differing consumer preferences, markedly in the regional variations in the desirability of foaming or "head", and to chemical variations in water supplies.

6) Beginning in approximately late-1975 and continuing for a period of about two years, Respondent introduced several formula changes which had unintended deleterious effects upon the Schlitz brand product. The product defects caused by these changes were principally turbidity, variously described as "flakes" or cloudiness in the product, and lack of head retention. Despite these objectionable visual effects, the taste and healthfulness of the product was not impaired. In some, but not all, instances the unintended defects could not be discerned at the time the product was made and packaged, but became manifest only after the trauma of shipment and the passage of time.

7) A substantial portion, but well less than one-half of all that was shipped, of the Schlitz brand product which was purchased by the Claimant during the subject period suffered from these defects. Claimant's transferees, mainly taverns, and their customers, objected to the visual defects.

8) Claimant's sales of the Schlitz brand fell substantially during the period 1976 through 1980. Some portion of this

decline in sales is directly attributable to the decrease in customer acceptance of the brand due to these defects.

9) Other causes of the Claimant's decline in sales include increasing marketing efforts by competitors, the questionable efficacy of the Respondent's advertising during some of this period, and unquantifiable and irrational changes in the tastes of Chicago area customers.

10) Claimant sold all of the offending product which it received from Respondent, and at its customary price. Pursuant to the contract in effect between the parties, Respondent would have taken back and given full credit for any product returned as defective or unsaleable. In fact Claimant never returned any such product to the Respondent.

11) Prior to the commencement of this Arbitration case and the related litigation, Claimant never gave notice to Respondent that it claimed or would seek damages or rescission regarding any alleged defective product, or regarding any purported loss of good will, enterprise value, or the like.

12) Respondent was acutely aware of the various product problems. It worked diligently to correct them. The length of time which was required to correct the various problems was not the result of any intentional misfeasance. Claimant did not present any evidence which would justify a finding that the Respondent breached any technical standard of care or of performance in the industry respecting the product defects and the efforts to correct them. Respondent did not benefit, and in fact was very adversely affected, by the product problems and the resulting contraction of its sales volume and market share.

13) At least as early as mid-1978, Schlitz was able to rectify the formula problems which caused the visual defects. All product shipped to the Claimant thereafter was unobjectionable.

14) Claimant sold its Schlitz brand franchise in September of 1981.

Discussion

Obviously I am quite willing to believe that the Claimant suffered some lost sales, and the concomitant loss of good will, as a result of bad product. It is however my view that quite a bit more than mere causality and damage must be proven to establish liability.

We have been led only to the outskirts of the facts which are needed to sustain a cause of action. The most which has been shown is that the product was for a time inferior as a result of various formula changes. There is of course no suggestion that Schlitz intentionally sabotaged the product; but there is also no hard proof that it was even negligent, leaving alone for the moment whether that would make a case. We have only been handed the fact of the defective product and asked to infer bad faith or some other sort of culpable breach of duty.

As I discuss below, I do not believe that any prescriptive term of the contract, or of the Uniform Commercial Code or of general contract law, was violated by the Respondent. Moreover, to the extent that the contractual or statutory admonitions of "good faith" might ground the cause of action, I would hold that the evidence falls far short.

THE LAW AS IT IS

Simply put, there is no reported decision anywhere which finds liability under the facts of this case. No theory grounded in the Uniform Commercial Code or the common law of contract sustains an award under the evidence in the case. Were liability properly found, there is yet no legal basis for the type of damages sought.

The Substantive Law

As noted I do believe that the Claimant did receive substantial amounts of defective, but saleable, product. On the threshhold issue of breach of warranty, I would hold that the fact that the Claimant was able to resell the product in the

ordinary course of its business, with no additional costs of sale attributable to the defects, and at its customary pre-problem margins, precludes as a matter of law any finding of breach of implied warranty. The issue of express warranty by sample and by quality of previous shipments is more complex; nothing could be more clear, though, that for a very long time after the product problems developed the Claimant continued to purchase in very large quantities. Clearly any warranty that arose from the earlier consistently good quality of the product vanished when the bad lots arrived. It is impossible on the state of the record even to guess at the period in time when the legal effect of such an express warranty could be held to justify damages to the Claimant.

At bottom I do not feel that this is really a warranty case at all. Where the buyer is purchasing for resale, and all of the goods purchased are in fact resold at the buyer's price, it seems inconsistent to attribute the buyer's damages to product which was in fact sold at the desired profit. Most if not all of the UCC cases discussing breach of warranty in goods purchased for resale involve the situation where the buyer receives bad product and is stuck with it, the issue being whether it is proper to put the risk of lost sales on the merchant buyer in the circumstances. The breach of warranty theory simply does not fit well in the present case, perhaps also for the same reasons that damages cannot be awarded for loss of good will or enterprise value.

In my view the disclaimers of warranty are totally effective to achieve the stated intent. The contract provision at paragraph 3, Section "C", clearly is sufficient to exclude implied warranties under UCC section 2-316(3)(a). Read in conjunction with the other contract terms, it is totally clear and unambiguous that the seller has the discretion to make its beer as it sees fit, and buyer's remedy is limited to repurchase by the seller of any nonconforming goods.

I would also hold that any implied warranty was excluded or modified (UCC 2-316(3)(c)) by the course of dealing and of performance of the parties. Here, the seller had the contractual right (subject in some cases to liquidated damages) to suspend or limit shipment of product to the Claimant; further, Claimant had an affirmative contractual obligation to give notice of defects in goods shipped within one week of receipt. To award the Claimant damages is in effect to reward it for failing to comply with its notice obligation; and, it seems, the longer the Claimant continued to order more product without proper complaint, in apparent acquiescence to or at least toleration of the problems, the larger the award is to be!

As to the claims of liability under the UCC and the common law for "bad faith", my review of the authorities establishes that something more than mere negligence is required, and as I have already said I do not feel that even negligence has been proven. Except for the mere lapse of time that Schlitz took to fix the product problems and return to production of consistently good beer, there is no evidence that Schlitz was not aware of the problem and working diligently on it, as of course Schlitz' own witnesses testified was the case. Much has been made of Schlitz' failure to acknowledge the problem publicly and to inform the distributors of its findings and intentions; in the competitive market which existed, and in view of the fact that the distributors were under no obligation to keep Schlitz' internal decisions confidential and that many distributors also had established relationships with other manufacturers, I should think that full disclosure of the problem to the distributors would have been out of the question. This failure to inform, coupled with the delay in correcting the product, is really all of the evidence we have as to non-warranty causes of action, and it does not come close to sustaining liability.

Measure of Damages

I have examined the authorities advanced by the Claimant for the proposition that it may recover hypothetical lost profits.

really loss in good will, because of a decline in sales resulting from inferior product. In my opinion this case cannot be distinguished from *Chrysler v. E. Shavitz & Sons,* 536 F.2d 743 (7th Cir. 1976). *Chrysler* seems to be the most recent pronouncement of Illinois law, and has been cited as representing the majority rule in this country.

The primary rationale for this policy of denying damages for lost good will, that they are speculative and conjectural, is well ratified in this case. When all of the tolerances of error in the various estimates and projections are put together, we have no better than a factor of ten within which to set a precise dollar figure, even taking all of the Claimant's evidence at face value. It is just not good policy to put a defendant 100 percent at risk of damages which cannot be ascertained more precisely.

CONCLUSION

What happened here was this. When the bad product started showing up regularly, the Claimant did two things, both totally logical and prudent. First, it decided to make its complaints known to Schlitz management in the most forceful way it could, in an attempt to bring the product back up to the old standards; next, it also took on additional lines to attempt to maintain its overall volume and margins (first Beck's, then Heineken's). When the sales volume of Schlitz continued to decline, for whatever reasons, the Geocaris family decided to venture into competing lines, and thus the Metropolitan Group was set up. While it may well be that none of the Claimant's hard assets or personnel were shared with the new companies, clearly its expertise and retailer contacts were. To some extent, the success of Metropolitan contributed to the decrease in Claimant's sales. And, as already noted, Metropolitan was established in large part by borrowing against Claimant's assets. In some measure, and I believe a very significant one, the declining sales of Claimant must therefore be offset by the concurrent profitability of Metropolitan for purposes of damage

assessment. (Note that Metropolitan and Claimant were consolidated for purposes of financial reporting and presumably had essentially identical effective ownership).

The asymmetry of the award rankles. For several years, the Claimant voluntarily decided to stick it out with Schlitz to see if the brand would come back. It never rejected or revoked acceptance of any shipment, nor did it give the claim notice required by the contract. Indeed, it made more than a little profit during some of the troubled period. It apparently is entitled to keep its profit from the good years, and also is allowed recourse against Schlitz for the bad years. If the distributor can tag the manufacturer with its losses due to bad product, as my colleagues hold, does it not follow that the manufacturer should share in the dealer's profits when times are good? It must be remembered that, for all the product problems, the Claimant and its principals achieved substantial wealth due to their relationship with Schlitz.

Putting it differently, to find Schlitz liable here is tantamount to making it the fiduciary, or the insurer, of the distributor's profits. If indeed this were the law, that some sort of strict liability obtained because of reduction in market share, there would seem to me to be a great hierarchy of persons who would be entitled to recover against the manufacturer under the circumstances of this case. In other words, should not e.g. the employees who lost their jobs, trade creditors who perhaps went unpaid, pensioners, and the like all have equally valid, or better, claims? I would in fact put the distributor's rights far down the list, probably last but for those of shareholders; after all, both the claimant and the shareholders voluntarily assumed the risk of product deviations and interruptions in supply.

And, when analyzed from one other, final, point of view, I think the literal absurdity of liability under the facts of this case is clear. If one accepts my view that there was no intent (or quasi-intent such as "gross negligence") on the part of Schlitz in producing bad product, the element of casuality is effectively removed from the discussion; the syllogism is not that bad

product makes bad market share makes liability, but rather that bad market share makes liability. In other words, the legal basis of the claim would not change much if the reason for Schlitz' market decline were the result of "bad management", interest rates, or what have you. Every bankrupt company would be liable to its distributors for cessation of shipment.

It may well be that for a long time the legal context of cases like this has been, as in Professor Gilmore's term, that of "Contort": liability analysis proceeding not from the basis of contract, even though only commercial relations between merchants are involved, but rather retrospective policy creation, usually without regard for whether the loser could have anticipated the result of the litigation or altered his conduct to avoid it. Even so, the award in this case cannot be squared with any known or workable economic order.

The Claimant and my colleagues have presented a number of authorities to the effect that arbitration awards will be upheld even if inconsistent with the law; I read these only to say that where a party to a binding arbitration agreement is dissatisfied with the result it will not be relieved from its contractual waiver of judicial review. Nowhere is it said that rights exist in arbitration which would not be honored by a court of law.

The claim does not withstand close analysis and should be denied.

Respectfully submitted,

_____

Thomas F. Miller

STATUTORY PROVISIONS INVOLVED

Section 9-12 of the Federal Arbitration Act, 9 U.S.C. §§ 9-12.

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a non-resident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

§ 10. Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a hearing by the arbitrators.

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

§ 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in the action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

Ill. Rev. Stat. ch. 26, § 2-106(1)

(1) In this Article unless the context otherwise requires "contract" and "agreement" are limited to those relating to the present or future sale of goods. "Contract for sale" includes both a present sale of goods and a contract to sell goods at a future time. A "sale" consists in the passing of title from the seller to the buyer for a price (Section 2-401). A "present sale" means a sale which is accomplished by the making of the contract.

Ill. Rev. Stat. ch. 26, § 2-725(1)

(1) An action for breach of any contract for sale must be commenced within 4 years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

Illinois Code Comment

By William B. Davenport

This is § 2-725 of the 1958 Official Text without change.

Subsection (1)

The first sentence of this subsection changes prior Illinois law with respect to contracts of sale of personal property. Previously, in the case of a written contract, the statute of limitations was ten years, see Ill.Rev.Stat. ch. 83, § 17 (1961); and in the case of an oral contract it was five years, see Ill.Rev.Stat. ch. 83, § 16 (1961). This section thus shortens both periods to four years.

The second sentence permits reduction, in the original agreement, of the four-year period to not less than one year. Under prior Illinois law a contractual limitation requiring suit upon it to be brought within one year after breach was held valid, since it allowed a reasonable time for any suit to be brought. Lesher v. United States Fid. & Guar. Co., 239 Ill. 502, 88 N.E. 208 (1909) (provision in a construction bond).

The provision in the second sentence that the parties may not extend the four-year period is in accord with decisional law in other jurisdictions, which has held contractual extensions of a statute of limitations contrary to public policy: National Surety Co. v. American Cement Tile Mfg. Co., 226 Ala. 373, 147 So. 158 (1933); Wright v. Gardner, 98 Ky. 454, 33 S.W. 622 (1895).